93-591

No. _____

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1993

DORIS JUANITA SWAILS,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

Petition For The Writ Of Certiorari
To The Supreme Court Of The State Of Georgia

PETITION FOR THE WRIT OF CERTIORARI

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October 13, 1993

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QUESTION PRESENTED FOR REVIEW

Does the Georgia Supreme Court's Decision Upholding Georgia's Drug Forfeiture Statute, O.C.G.A. Section 16-13-49, offend Due Process where the statute denies a trial by jury despite the clear language of the Georgia Constitution that "[t]he right to trial by jury shall remain inviolate".

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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No. _____

In The

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DORIS JUANITA SWAILS,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

Petition For The Writ Of Certiorari To The Supreme Court Of The State Of Georgia

PETITION FOR THE WRIT OF CERTIORARI

Petitioner, DORIS JUANITA SWAILS, prays that the Writ of Certiorari issue to the Georgia Supreme Court to review the decision of that court entered July 15, 1993.

OPINIONS BELOW

Reproduced in the appendix to the petition are (1) the decision of the Georgia Supreme Court dated June 14, 1993, (2) the decision of the Georgia Supreme Court dated July 15, 1993, denying petitioner's Motion for Reconsideration, and (3) the decision of the Georgia Supreme

Court dated July 15, 1993, granting a stay of the remittitur.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1257(a) which authorizes the grant of the writ of certiorari to the highest court of a state in a case where the validity of a statute of a state is drawn into question on the ground of its being repugnant to the Constitution of the United States or a privilege or immunity is specifically claimed under the Constitution of the United States. The Georgia Supreme Court denied petitioner's timely Motion for Reconsideration on July 15, 1993. In accordance with Rule 13(1) & (4) of this court, this petition is filed within ninety (90) days of the entry of the final judgment of the Georgia Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment Section One:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The State of Georgia filed a petition to forfeit certain personal property owned by DORIS JUANITA SWAILS seized from her place of business in Clayton County, Georgia. The petition was filed pursuant to Georgia's Drug Forfeiture Law, O.C.G.A. Sec. 16-13-49. This statute permits forfeiture of property which is "found in close proximity to" a controlled substance, or is "derived or realized from" or "used . . . to facilitate a violation of" Georgia's Controlled Substance Act. O.C.G.A. Sec. 16-13-49(d). The statute specifically provides that contested hearings thereunder "must be held by the court without a jury." O.C.G.A. Sec. 16-13-49(o)(5). In her answer, petitioner moved to dismiss the complaint complaining the statute was unconstitutional because, among other reasons, it denied claimants the right to a trial by jury and due process as guaranteed by the state and federal constitutions. Petitioner also demanded a trial by jury.

Following the trial court's denial of her motion and demand for a jury trial petitioner sought and obtained an interlocutory review by the Georgia Supreme Court. On June 14th, 1993, in a 4 to 3 decision that court affirmed the trial court's decision finding neither the Georgia nor United States Constitution require jury trials in drug forfeiture cases.

REASONS FOR GRANTING THE WRIT

THE GEORGIA SUPREME COURT'S DECISION UPHOLDING GEORGIA'S DRUG FORFEITURE STATUTE, O.C.G.A. SECTION 16-13-49, VIOLATES DUE PROCESS BECAUSE IT DENIES A TRIAL BY JURY DESPITE THE CLEAR LANGUAGE OF THE GEORGIA CONSTITUTION THAT "[T]HE RIGHT TO TRIAL BY JURY SHALL REMAIN INVIOLATE."

Article 1, Section 1, Paragraph 11 of the Constitution of Georgia of 1983 provides that "[t]he right to trial by jury shall remain inviolate." This is reiterated in O.C.G.A. Section 9-11-38 where it is declared "[t]he right of trial by jury as declared by the Constitution of the state . . . shall be preserved to the parties inviolate." The State Constitution also provides for trial by jury unless "no issuable defense is filed and where a jury is not demanded in writing by either party." Article 1, Section 1, Paragraph 11.

In its 4 to 3 decision the Georgia Supreme Court majority, while observing that both the United States and Georgia constitutional guarantees of a trial by jury extend generally to those actions cognizable at common law, reached the novel conclusion that the *in rem* proceeding at issue is a " 'new remedy' which did not exist at common law, but which was enacted subsequent to 1789 so as to accomodate the 'shifting state of society.' " Majority Opinion at page 4. Essentially, the majority narrowly reasoned that since no drug forfeiture statutes existed at common law the right to a trial by jury did not attach.

As noted by the dissenters, this case does not involve "a question of the breadth of the state constitution. Rather, it is a question of the parallel drawn between

statutory proceedings known at common law and proceedings as they exist today." Dissent at page 3. The dissent rightly describes the arbitrariness of the majority result as such that it simply ignores the contrary conclusion reached by a multitude of other state and federal courts which is so clear as to be "inescapable." Dissent at page 2. Those courts have correctly held that the analysis "should not examine whether the specific rer edy existed at common law, but whether the *nature* of the action existed at the time." (emphasis supplied) Dissent at page 2. Decisions which have endorsed the dissent's view include *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980); *Commonwealth v. One (1) 1984 Z-28 Camaro Coupe*, 610 A.2d 36 (Pa. 1992); *Medlock v. 1985 Ford F-150 Pick Up*, 417 S.E.2d 85 (SC 1992); *Abrams v. One 1987 Chevrolet Corvette*, 555 N.Y.S.2d 503 (1990); *In re Forfeiture of 1978 Chevrolet Van*, 493 So.2d 433 (Fla. 1986); *Commonwealth v. One 1972 Chevrolet Van*, 431 N.E.2d 209 (Mass. 1982); *Matter of Vergari v. Marcus*, 257 N.E.2d 652 (NY 1970). This approach is entirely consistent with that applied by this court in a closely related context. See *Pernall v. Southall Realty*, 416 U.S. 363 (1974), which recognized that a special dispossessory proceeding in the District of Columbia, although only recently enacted, was nonetheless a common law remedy for which the 7th Amendment right to a jury trial attached because actions of its nature (for the recovery of possession of property) carried with it the right to a trial by jury at common law.

The majority opinion also fails to take into account the primary legislative purpose of the statute which is to allow "forfeiture of the property interest of the wrongdoer and those who knew or should have known of the

criminal use of the property . . . ". *State v. Jackson*, 197 Ga. App. 619, 621, 399 S.E.2d 88 (1990). As one commentator has written,

> How did this odd form of civil proceeding come about? Justice Holmes, in the first chapter of his book The Common Law, traces the origin of *in rem* forfeitures to primitive man's "personification of inanimate nature." He observes that "[a]n untrained intelligence only imperfectly performs the analysis by which jurists carry responsibility back to the beginning of a chain of causation. The hatred for anything giving us pain, which wreaks itself on the manifest cause . . . leads even civilized man to kick a door when it pinches his finger . . . ". This type of untutored thought was the basis for the curious medieval English institution of the deodand, which made any object causing the death of a man subject to forfeiture to the Crown. The deodand is generally thought to be the source of *in rem* forfeitures.

Smith, David B., *Prosecution and Defense of Forfeiture Cases*, pp. 2-3 (Mathew Bender 1988).

It is this "quasi-criminal" nature of the proceedings which lends additional support to petitioner's claim that she is entitled to a jury trial. This court has long recognized that the right to trial by jury guaranteed by the 6th Amendment is one of the aspects of due process which is extended to state criminal proceedings by 14th Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968). While petitioner certainly faces no incarceration as a result of the instant proceeding, she stands to suffer significant financial loss as a result thereof. Only recently this court has acknowledged this consequence may be properly

termed "punishment" within the meaning of the 8th Amendment prohibition against cruel and unusual punishments. *Austin v. United States*, ___ U.S. ___, 113 S.Ct. 2801 (1993). Similarly, the judicial application of the 7th Amendment exclusionary rule to such proceedings is indicative of the special hybrid status which they possess. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701 (1965); *United States v. Elgersma*, 929 F.2d 1538, 1548, n. 21 (11th Cir. 1991); *Pitts v. State*, 207 Ga. App. 606, 607, ___ S.E.2d ___ (1993). Recognition of developments such as these tend to mitigate against a rigid extension of the commonly perceived notion that the 7th Amendment guaranty of jury trials in civil cases is not an element of due process applicable to the state courts through the 14th Amendment. See *Bringe v. Collins*, 274 Md. 338, 335 A.2d 670, cert. denied, 421 U.S. 983 (1975). Indeed, their consideration compels the conclusion that the more appropriate approach to the problem is that employed by the court in *Hicks v. Oklahoma*, 447 U.S. 343 (1980), wherein it was determined that the arbitrary denial of a purely state created right was a violation of the 14th Amendment due process clause. Significantly, *Hicks* also involved the state created right to a jury consideration of the issues.

CONCLUSION

In its decision in this case the Georgia Supreme Court applied a narrow and illogical analysis inconsistent with that embraced by a majority of the courts of its sister states as well as the federal courts. It reached a conclusion which was clearly erroneous and flies in the face of

historical fact. The approach taken by the majority can only be termed arbitrary and capricious. The result was to deny petitioner a state created right to which she was clearly entitled. None can deny the drug problem in this country is a serious and pervasive one. However, that is no justification for giving the states carte blanche to deny accused citizens basic and fundamental protections of the law. The right to a trial by jury in proceedings such as the one at bar is universally recognized as having an almost sacred place in the common law. It is a fundamentally important safeguard which may not be arbitrarily denied even where the grant of that right is a matter of state constitutional or statutory origin. For these reasons, as was argued to the court below, Georgia's drug forfeiture statute and the decision complained of violate the due process guarantee of the 14th Amendment.

The petition for certiorari merits acceptance. It should be granted, a full review conducted and the decision below reversed.

Respectfully submitted,

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S93A0395

SUPREME COURT OF GEORGIA

ATLANTA JUL 15 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

BY: CARLEY, J.

The following direction was given:

CHARLES ROBERT SWAILS et al. v. THE STATE

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on July 15, 1993, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme

Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that court.

/s/ George H. Carley
Justice George H. Carley

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

SUPREME COURT OF GEORGIA

ATLANTA JULY 15, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S93A0395

CHARLES ROBERT SWAILS ET AL. V. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Benham, Sears-Collins and Hunstein, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

In the Supreme Court of Georgia

Decided: JUN 14 1993

S93A0395. SWAILS v. STATE OF GEORGIA.

CARLEY, Justice.

Pursuant to OCGA § 16-13-49, the State filed a petition for forfeiture of property seized from appellant's place of business. Appellant answered, seeking the return of the property. Although OCGA § 16-13-49 (o) (5) and (p) (6) provide that the proceeding "must be held by the court without a jury[,]" appellant nevertheless filed a demand for jury trial and attacked the constitutionality of those statutory provisions. Following a hearing, the trial court found no merit in appellant's constitutional challenge to the statutory provisions mandating a bench trial. The trial court did, however, certify its order for immediate review. Appellant applied for an interlocutory appeal and we granted that application to determine whether a jury trial must be afforded upon demand in forfeiture proceedings under OCGA § 16-13-49.

1. This is *not* a case involving construction of a forfeiture statute which *fails* to provide whether it is a bench trial or jury trial that is mandated. Subsections (o) (5) and (p) (6) of OCGA § 16-13-49 expressly mandate that the proceeding "must be held by the court without a jury." Accordingly, the issue presented for resolution is whether the Federal or State Constitutions prevent that express legislative mandate from having any force and effect. " 'Absent a debilitating constitutional flaw in the Act, this court must effectuate the common will expressed in the purpose of the legislation.' [Cit.]" *Bryan*

v. Ga. Public Service Comm., 238 Ga 572, 575 (234 SE2d 784) (1977).

2. The Seventh Amendment to the Federal Constitution provides that "[i]n Suits at common law, . . . the right of trial by jury shall be preserved. . . . " "The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty and maritime jurisprudence. . . . By common law, [the Framers of the Amendment] meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit. . . . In a just sense, the amendment then may well be construed to embrace *all suits, which are not of equity and admiralty jurisdiction*, whatever may be the peculiar form which they may assume to settle legal rights." (Emphasis supplied.) *Parsons v. Bedford, Breedlove & Robeson*, 3 Pet. 433, 446-447 (1830).

Under this broad construction, whereby a suit must be deemed to be one which is in "common law" if it is not otherwise in equity or admiralty, it necessarily follows that the Seventh Amendment to the Federal Constitution mandates a jury trial in *federal* drug forfeiture actions wherein neither equity nor admiralty jurisdiction otherwise attaches. See *United States v. One 1976 Mercedes Benz 2808*, 618 F2d 453 (7th Cir. 1980). The Seventh Amendment does not narrowly provide "that no jury trial is required in a cause of action created by statute since any

such action would have been unknown to the common law and therefore beyond the reach of the Seventh Amendment." *Rogers v. Loether,* 467 F2d 1110, 1115 [4] (7th Cir. 1972). Instead, the Seventh Amendment broadly applies "to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Curtis v. Loether,* 415 U.S. 189, 194 (94 SC 1005, 39 LE2d 260) (1974). Under the broadly construed language of the Seventh Amendment, "when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis v. Loether,* supra at 195.

It is clear, however, that the Seventh Amendment to the Federal Constitution would not prevent our General Assembly from providing for a bench trial in statutory forfeiture proceedings. *Van Oster v. Kansas,* 272 U.S. 465, 467 (47 SC 133, 71 LE 354) (1926). That amendment "does not apply to suits in State courts. [Cit.]" *Butler v. Claxton,* 221 Ga. 620, 621 (146 SE2d 763) (1966).

3. Our State Constitution does not track the broad language of the Seventh Amendment to the Federal Constitution preserving the right to jury trial "[i]n Suits at common law. . . . " Instead, Art. I Sec. I, Par. XI (a) provides that "[t]he right to trial by jury shall remain inviolate. . . . " Accordingly, for purposes of determining whether there is a *state* constitutional right to a jury trial in a given action, it is not sufficient to eliminate equity

and admiralty jurisdiction and reach the conclusion that the action must, therefore, be a suit "at common law" in which a jury trial is mandated. The right to a jury trial under our State Constitution is not as broad as that afforded under the Federal Constitution. The provision of our State Constitution regarding the right to jury trial "means that it shall not be taken away, *as it existed in 1798*, when the [first] instrument was adopted, *and not that there must be a jury in all cases*. New forums may be erected, and *new remedies provided*, accommodated to the ever shifting state of society." (Emphasis supplied in part.) *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 207-208 (1848). See also *Hill v. Levenson*, 259 Ga. 395 (1) (383 SE2d 110) (1989). Obviously, the right to jury trial in drug forfeiture proceedings did not exist in 1798. This is true because the statute authorizing drug forfeiture is a "new remedy" which did not exist at common law, but which was enacted subsequent to 1798 so as to accommodate the "shifting state of society." See generally *Bowman v. Davis*, 51 Ga. App. 478, 479 (3) (180 SE2d 917) (1935) (recognizing that the former statute providing for condemnation of private vehicles used in the transportation of intoxicating liquors over the highways was "in derogation of the common law. . . . ") "[T]here is no state constitutional right to a jury trial with respect to *proceedings of statutory origin unknown at the time the Georgia Constitution was adopted*. [Cit.]" (Emphasis supplied.) *Benton v. Ga. Marble Co.*, 258 Ga. 58, 66 (4) (365 SE2d 413) (1988). Since the provisions of OCGA § 16-13-49 create a statutory proceeding which was unknown in 1798, it follows that the General Assembly was authorized to provide for a bench trial in that proceeding and that the trial court in the

instant case correctly overruled appellant's challenge to the constitutionality of OCGA § 16-13-49 (o) (5) and (p) (6).

Judgment affirmed. All the Justices concur, except Benham, Sears-Collins and Hunstein, JJ., who dissent.

S93A0395. SWAILS v. THE STATE

HUNSTEIN, Justice, dissenting.

Because the majority opinion denies the right to a jury trial guaranteed by Art. I, Sec. I, Par. XI (a) of the Constitution of Georgia of 1983, I must respectfully dissent. The majority concludes the General Assembly was authorized to provide for trial without a jury in OCGA § 16-13-49 (o) (5) because *drug* forfeiture proceedings did not exist prior to the adoption of the first Georgia Constitution. Believing that the right to a jury trial includes statutory proceedings of a similar nature that have arisen since the adoption of our Constitution, I would reverse the trial court.

As the majority notes, it is well established that in civil actions at law, "the right to trial by jury exists only where the right existed prior to the adoption of the first Georgia Constitution [in 1798]. [Cits.] The 1983 Georgia Constitution and OCGA § 9-11-38 assure that this right shall remain inviolate." *Hill v. Levenson*, 259 Ga. 395 (1) (383 SE2d 110) (1989). In short, jury trials are available in proceedings that have a common law basis. This is in contradistinction to equity cases where the "right of a trial by jury is not constitutional, but statutory; and a legislative restriction thereof . . . would be constitutional." *Williams v. Overstreet*, 230 Ga. 112, 115 (III) (195 SE2d 906) (1973). Although no Georgia appellate decisions predate the 1798 Constitution, an exhaustive review of English and American practice prior to 1791 was undertaken by the Seventh Circuit Court of Appeals in *United States v. One 1976 Mercedes Benz 280 S*, supra. The inescapable conclusion it reached was that jury trials of in

rem actions were recognized "at common law as the established mode of determining the propriety of statutory forfeitures on land for breach of statutory prohibitions." Id. at 466. Thus, contrary to the majority result, we should not examine whether the *specific remedy* existed at common law, but whether the nature of the action existed at that time.

Although no Georgia authorities have addressed whether a party has a constitutional right to a jury trial in a civil condemnation proceeding in rem, it has been held in a majority of other jurisdictions which have addressed this issue that a right to trial by jury exists in similar forfeiture proceedings. See e.g., *Commonwealth v. One (1) 1984 Z-28 Camaro Coupe*, 610 A2d 36 (Pa. 1992); *Medlock v. 1985 Ford F-150 Pick Up*, 417 SE2d 85 (SC 1992); *Abrams v. One 1987 Chevrolet Corvette*, 555 NYS2d 503 (1990); *In re Forfeiture of 1978 Chevrolet Van*, 493 So2d 433 (Fla. 1986); *Commonwealth v. One 1972 Chevrolet Van*, 431 NE2d 209 (Mass. 1982); *Matter of Vergari v. Marcus*, 257 NE2d 652 (NY 1970). But cf. *In re Forfeiture of $1,159,420*, 486 NW2d 326, 337 (XII) (Mich. App. 1992) (forfeiture action is equitable in nature, thus no right to jury trial exists); *State v. Morris*, 405 SE2d 351 (N.C. App. 1991).

Contrary to the majority's contention, this is not a question of the breadth of the state constitution. Rather it is a question of the parallel drawn between statutory proceedings known at common law and proceedings as they exist today. Although the drug of choice may vary with the times, no common sense distinction exists between the underlying nature of forfeitures before 1798 and the proceedings under OCGA § 16-13-49. This conclusion is consistent with legislative treatment of other

forfeiture proceedings in Georgia pursuant to which trial by jury was and is required. See OCGA § 16-12-32 (f) (gambling devices) in which proceedings in the *superior* court "shall proceed as other civil cases in said court"; former Ga. Code Ann. §58-207 (alcoholic beverages) which provided prior to its repeal (Ga. L. 1980, p. 1573, 1652) that where a defense to the forfeiture of a vehicle used to convey alcohol was raised in a county, city or *superior* court "the case shall proceed as other civil cases in said court"; see also *Grant v. State*, 74 Ga. App. 493 (40 SE2d 406) (1946) (jury trial had in vehicle condemnation proceeding).

I would therefore conclude that OCGA § 16-13-49 (o) (5), which provides for a trial without a jury, violates the right to jury trial. I recognize that this approach would add to the caseload of our state court system. However, I must agree with *United States v. One 1976 Mercedes Benz 280S*, supra at 468, that "in any event, mere inconvenience would be insufficient reason for denying a traditional and substantial constitutional right. [Cits.]"

I am authorized to state that Justice Benham and Justice Sears-Collins join in this dissent.